

255 Butler Assoc. LLC v 255 Butler, LLC
2021 NY Slip Op 32708(U)
December 16, 2021
Supreme Court, Kings County
Docket Number: Index No. 511560/15
Judge: Leon Ruchelsman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

-----x
255 BUTLER ASSOCIATES LLC,

Plaintiff,

Decision and order

- against -

Index No. 511560/15

255 BUTLER, LLC, ARIEL AKKAD, NATHAN
AKKAD, SOLOMON AKKAD and BEJAMIN
AKKAD,

Defendants,

December 16, 2021

-----x
PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to preclude the defendants from introducing any evidence of good faith on the part of the defendants. The defendants have cross-moved seeking to dismiss the entire trial on the grounds it is precluded by a ruling of the Appellate Division. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The amended complaint asserted four causes of action. The first sought a declaratory judgement there was no default under the lease. The second sought a breach of the implied covenant of good faith and fair dealing. The third sought a breach of the covenant of quiet enjoyment and a constructive eviction and the fourth sought tortious interference with prospective economic advantage. All four causes of action stem from the same allegedly wrongful conduct, namely serving defaults the plaintiff claims were knowingly false. On February 21, 2018 Justice Ash denied defendants motion to dismiss the complaint. On appeal the

Appellate Division modified the order in a decision dated June 5, 2019 (see, 255 Butler Associates LLC v. 255 Butler LLC, 173 AD3d 655, 102 NYS3d 699 [2d Dept., 2019]). The Appellate Division specifically noted that "the amended complaint properly stated a cause of action to recover damages for breach of the implied covenant of good faith and fair dealing by alleging that the landlord's unlawful conduct destroyed and/or frustrated the tenant's right 'to receive the fruits of the [lease]'" (id). Further, the court held "the amended complaint also stated a cause of action to recover damages for breach of the covenant of quiet enjoyment by alleging that the tenant was deprived of the beneficial use of the subject property based on the landlord's alleged wrongful service of notices of default and termination" (id). Concerning the tortious interference claim the court ruled that "the facts alleged in the amended complaint establish that the defendants' alleged actions were motivated by self-interest and other economic considerations, and not for the sole purpose of harming the plaintiff" and concluded the plaintiff failed to state a cause of action in this regard.

The defendant now argues that since the Appellate Division has already concluded the landlord did not act solely for the purpose of harming the plaintiff there is no way the plaintiff can establish the necessary bad faith inherent in the breach of implied covenant of good faith and constructive eviction causes

of action. As the defendant explains, those causes of action are now "precluded by the June 5, 2019 Decision of the Appellate Division which, in the course of dismissing the Tenant's cause of action for tortious interference, held that as a matter of law the Landlord did not act with malice or wrongfully in transmitting the Notices" (see, Affidavit in Opposition to Plaintiff's Motion to Preclude and in Support of Defendant's Cross-motion to Preclude And/or Dismiss Damage Causes of Action, ¶ 17).

It is well settled that to establish a claim of tortious interference with prospective economic advantage the plaintiff must demonstrate that the interference with the plaintiff's prospective business relations was accomplished by wrongful means or that the defendant acted for the sole purpose of harming the plaintiff (Tsatskin v. Kordonsky, 189 AD3d 1296, 138 NYS3d 641 [2d Dept., 2020]). Since no formal contract exists at this point, this tort requires a greater degree of culpability than interfering with an already existing contract (Carvel Corp. v. Noonan, 3 NY3d 182, 785 NYS2d 359 [2004]). In Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp., 50 NY2d 183, 428 NYS2d 628 [1980] the court explained that tortious interference with economic advantage does not exist "where the interference is intended at least in part to advance the competing interest of the interferer, no unlawful restraint of trade is effected, and

the means employed are not wrongful" (id). Thus, there is no element of bad faith per se which applies to this tort. Therefore, the Appellate Division concluded the conduct of the defendant in issuing an allegedly false default notice did not rise to the high level demanded of this tort wherein the conduct was wrongful or was done for the sole purpose of harming the plaintiff.

The cause of action for a breach of implied covenant of good faith and fair dealing is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). Thus, to succeed upon this claim "the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff" (see, Aventine Investment Management Inc., v. Canadian Imperial Bank of Commerce, 265 AD2d 513, 697 NYS2d 128 [2d Dept., 1999]). Indeed, "the elements of a claim for breach of the duty of good faith and fair dealing are practically identical to the elements of a negligence claim: (1) defendant must owe plaintiff a duty to act in good faith and conduct fair dealing; (2) defendant must breach that duty; and (3) the breach of duty must proximately cause plaintiff's damages" and includes "any promises which a reasonable person in the position of the promisee would be

justified in understanding were included [in the contract] (see, Pastor v. Woodmere Fire District, 2016 WL 6603189 [E.D.N.Y. 2016])). While the breach of a covenant of good faith and fair dealing maintains an element of bad faith it does not rise to the level of wrongful conduct necessary to establish any tortious interference with prospective business relations. The 'wrongful' conduct demanded of tortious interference includes "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (Guard-Life, supra). That high standard is not comparable at all to the bad faith necessary to establish a claim for the breach of good faith and fair dealing.

Further, a constructive eviction occurs when the landlord's "wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (Barash v. Pennsylvania Real Estate Terminal Real Estate Corporation, 26 NY2d 77, 308 NYS2d 649 [1970])). In Dinicu v. Groff Studios Corp., 257 AD2d 218, 690 NYS2d 220 [1st Dept., 1999] the court held that "a constructive eviction occurs when a tenant, though not physically barred from the area in question, is unable to use the area for the purpose intended" (*id.*). It goes without saying that an eviction can only occur if the landlord did something wrong. Of course, there can be no constructive eviction if there is no evidence the landlord acted in any wrongful manner (905 5th

Associates Inc., v. 907 Corporation, 47 AD3d 401, 851 NYS2d 393 [1st Dept., 2008]). Again, the wrongful activity necessary to establish a constructive eviction is far short of the wrongful conduct necessary to establish a tortious interference with prospective economic advantage.

In truth, the defendant's entire argument is premised on the fact the same standard of conduct applies to all three activities, namely, the tortious interference with prospective business relations, any breach of a covenant of good faith and a constructive eviction. As demonstrated, these three causes of action carry different standards of conduct and different levels of care. Indeed, it would be entirely inconsistent for the Appellate Division to sustain the causes of action of breach of covenant of good faith and constructive eviction and dismiss the claim for tortious interference if they all maintained the same standard of care. To the extent the defendants believe the same standard applies to all three then the proper venue to address those concerns is the Appellate Division. However, this court, examining the guidance of the Appellate Division and the standards necessary to prove the three causes of action perceives no such inconsistency. The fact the tortious interference claim was dismissed does not demand the dismissal of the two other claims. The simple fact the Appellate Division did not dismiss them further demonstrates their vitality at this time.

Therefore, based on the foregoing, the motion seeking to dismiss the damages trial is consequently denied.

The plaintiff has moved seeking to preclude the introduction of good faith by defendants on the grounds the plaintiff has withheld contemporaneous communications with its counsel. The defendants oppose the motion on the grounds the request should have been made sooner. Notwithstanding, the defendants have not presented any evidence that any prejudice will accrue if the plaintiff's are afforded this information or are given an opportunity to object to any privilege log. This is particularly true since the legal basis of the defendant's within cross-motion filed on the eve of trial was fully known to them since June 5, 2019. Of course, this does not mean the plaintiff is entitled to that potentially privileged information, rather, they should have an opportunity to argue they are so entitled and if still not produced then a preclusion order should issue. This is not merely a discovery issue that may not be raised after the filing of a Note of Issue, but rather a trial issue. Despite the fact it could have been raised sooner the importance of the information sought necessitates it is addressed on the merits. In that vein, the court generally agrees the defendants will be permitted to introduce evidence of good faith in their defense subject to the disclosure issue noted.

To streamline this final dispute before trial the plaintiff

may file any motion in this regard. The motion should be in letter form to expedite its resolution. The defendants will be afforded an opportunity, via letter, to oppose any motion. The parties may reach out to the court at any time.

So ordered.

ENTER:

DATED: December 16, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC